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IN THE

Supreme Court of the United States

October Term, 1972

No. .....

GEORGE C. PARKER, 72-1516 *Petitioner,*

vs.

UNITED STATES OF AMERICA,

Respondent.

JAMES W. BOYLAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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UNITED STATES OF AMERICA,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners George C. Parker and James W. Boylan respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 10, 1973.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Eastern District of California.

Jurisdiction.

The Judgment of the Court of Appeals for the Ninth Circuit was entered on April 10, 1973. This Petition for Certiorari was filed within thirty (30) days of that date. This Court's jurisdiction was envoked under 28 U.S.C. §1254, 1.

Questions Presented.

1. Did the United States use devices and methods to obtain an amended indictment against petitioners which violated the protection guaranteed them by Amendment V of the United States Constitution?

2. May a criminal prosecution of a capital or otherwise infamous crime constitutionally proceed under an indictment which may have been unlawfully obtained?

Constitutional Provisions Involved.

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ."

Statement of the Case.

Petitioners in the within proceedings are George C. Parker and James W. Boylan (indicted under the name of James C. Boylan).

On June 28, 1972, an indictment issued out of the United States District Court for the Eastern District of California against Parker and Boylan [Criminal No. F-1601]. That indictment attempted to charge Parker and Boylan with 22 counts of violations of 18 U.S.C. 371 (Conspiracy); 18 U.S.C. 1005 (Making false entries in bank records); 18 U.S.C. 2 (Aiding and abetting); 18 U.S.C. 215 (Receipt of commissions or gifts).

The indictment was obtained on the basis of testimony and other evidence given and produced by numerous witnesses before the Grand Jury in Fresno, California.

Parker and Boylan appeared and attacked said indictment on the ground, among others, that all relevant counts thereof failed to charge any criminal intent. A jurisdictional allegation was also lacking.

On October 30, 1972, the United States conceded the defectiveness of the indictment in action No. F-1601 and moved the District Court for the dismissal thereof. The court granted said motion.

Prior to said date, the United States had obtained a second, amended indictment against Parker and Boylan from the Sacramento Grand Jury. The second, amended indictment was filed in the Sacramento District Court on October 11, 1972 [Criminal No. F-1713].

The second indictment contains allegations identical to those contained in the first indictment [No. F-1601], to which were added only allegations of criminal intent and a jurisdictional sentence.

Parker and Boylan assert that the second indictment was unlawfully obtained:

(a) The second indictment is unconstitutional in that it is the indictment of the United States Attorney and not that of a grand jury.

(b) The Sacramento Grand Jury deliberated the charges against Parker and Boylan, consisting of 22 counts, for a period of not more than one and one-half hours hearing only the hearsay testimony of a special agent of the Federal Bureau of

Investigation without being advised of the availability of, and its right to be presented with, non-hearsay, admissible evidence.

The Fresno District Court denied Parker and Boylan's motions to dismiss the second indictment (after it had allowed Parker and Boylan to inspect the Sacramento Grand Jury minutes, and after it had permitted the examinations of the foreman of the Sacramento Grand Jury and the special agent of the Federal Bureau of Investigation, the only witness who had testified before the Sacramento Grand Jury).

However, on December 27, 1972, District Judge M. D. Crocker certified for appeal to the Court of Appeals for the Ninth Circuit his ruling denying the dismissal of the indictment.

Judge Crocker had stated on two occasions, on the record, that he desired "to have the matter decided in the Ninth Circuit. To my knowledge there is no Ninth Circuit decision on the point."

On April 9, 1973, Parker and Boylan argued to the Court of Appeals for the Ninth Circuit that the court should issue its writs of prohibition or mandate directing the Fresno District Court to cease further proceedings under the second amended indictment [No. F-1713].

The Circuit Court denied the application, stating from the bench, during oral argument, in substance, that petitioners' rights are protected by the right to an appeal after plea, trial and conviction.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Raises the Significant, Recurring and Unsettled Question Whether Petitioners, Prior to an Appeal-After-Conviction, Are Entitled to a Judicial Determination of the Constitutionality of the Indictment by Which They Have Been Charged.

The United States Constitution provides, in part, that:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on the presentment or indictment of a grand jury, . . ." (*U.S. Const.*, Amend. V.)

This court has held, repeatedly and uninterruptedly that the indictment of a grand jury must be strictly construed and may not be altered or amended by a judge or prosecutor. (*Russell v. U.S.*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); *Stirone v. U.S.*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887).)

This court has held that an indictment may be amended only by resubmission to the grand jury. (*Russell v. U.S., supra.*)

For many years, prosecutorial practices have made inroads into these constitutional protections.

The Second, Seventh and District of Columbia Circuits have begun to scrutinize proceedings had before federal grand juries. (*Gaither v. U.S.*, 413 F.2d 1061 (D.C. Cir. 1969); *United States v. Amabile*, 395 F.2d 47 (7th Cir. 1968); *United States v. Umans*, 368 F.2d 725 (2d Cir. 1966).)

In the case at bar, petitioners were indicted after weeks of hearings before the federal grand jury sitting in Fresno, California, on 22 counts of violations of the Banking Act. The grand jury did not charge petitioners with any intent to injure or defraud the bank. When that issue was raised in the district court the United States moved to dismiss the indictment. The United States made such motion, however, only after it had obtained from a different grand jury, sitting in a different city, a second, amended indictment alleging identical violations of the Banking Act, only this time the indictment contained allegations of criminal intent.

Whereas the first indictment took weeks to obtain and required the testimony of many witnesses, the second indictment issued after one and one-half hours of hearsay testimony by one agent of the Federal Bureau of Investigation armed only with his own notebook. The Sacramento Grand Jury, out of which issued the second indictment, was not advised of the availability of non-hearsay evidence or its right to receive the same. The foreman of the Sacramento Grand Jury received the amended indictment two and one-half hours before the grand jury convened and followed each count as it was recited by the only witness. (As a matter of fact, the Sacramento Grand Jury had sufficient time left over, in the two-hour morning session of October 11, 1972, to pass on four or five other indictments.)

Thus, the sequence of events which occurred is that an indictment issued out of the Fresno Grand Jury which did not allege any criminal intent by the defendants; the United States Attorney amended the indictment by inserting therein necessary allegations of criminal intent and submitting it to a different grand jury which issued it *pro forma*.

Petitioners asserted to the district and circuit courts that this *device and method* employed by the United States Attorney did not meet the constitutional guarantee of the Fifth Amendment nor did it satisfy the "integrity of judicial process."[1]

The Ninth Circuit refused to review the constitutionality of the indictment as well as the methods by which it was obtained at this stage of the proceedings. It requires petitioners to plead, go through a trial and thereafter appeal from a possible conviction before it will rule upon the constitutional issues raised by petitioners prior to plea.

The problem was well stated by District Judge Harold R. Tyler, Jr. of the Southern District of New York in the case of *United States v. Filippatos*, 307 F.Supp. 564, 565 (S.D.N.Y. 1969):

> "Though the indictment of the grand jury is no more than an accusation bearing no evidentiary value at trial and does not in any way change the presumption of the defendant's innocence, there can be no doubt that an indictment by a grand jury places on a defendant the heavy burdens of expending time, energy, and capital in the defense of his case and almost certainly of meeting the social opprobrium that shadows him while under the charge of the indictment. In addition, trial of

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[1]The phrase "the integrity of the judicial process" was used by Circuit Judge J. Joseph Smith, speaking for an unanimous court, in his opinion in the case of *United States v. Leibowitz*, 420 F.2d 39, 42 (2d Cir. 1969). The sentence (in a decision refusing to reverse a conviction in which the underlying indictment was in part based on hearsay evidence) reads:

> "Indictments obtained principally or wholly upon the basis of hearsay evidence, even though direct testimony was available, will not be dismissed unless it appears that *dismissal is required to protect the integrity of the judicial process.*" (Emphasis added.)

> charges brought without a sufficiently solid basis is wasteful of the courts' time and an improper abuse of public funds. Thus, it is appropriate that the court should seek certainty that the evidence presented to grand juries by its officers is such that the grand jury can receive a clear notion of the prosecutor's case. Grand juries which observe the demeanor of the government's witnesses and hear their stories from their own mouths are most likely to perform their historic function best."

If a prosecutor, such as in the case at bar, with impunity and without limitations (particularly after one grand jury finds no criminal intent), custom-makes an amended indictment and thereafter obtains the *pro forma* issuance thereof by a different grand jury in proceedings where he presents only hearsay evidence and during which no record is kept, then the underlying constitutional protection becomes no more for a defendant than "a taunting chimera." (*United States v. Filippatos, supra,* at p. 566.)

Judge Tyler then continues in *United States v. Filippatos, supra,* at page 566:

> "The courts now face the difficult task of weaving into one rule the historic freedom of the grand jury and the protection of the defendant which the grand jury was established to provide. The Court of Appeals for the Second Circuit has stated its judgment of how the balance should be struck in United States v. Umans, 368 F.2d 725 (2d Cir. 1966), cert. granted, 386 U.S. 940, 87 S.Ct. 975, 17 L.Ed.2d 872, cert. dismissed as im-

providently granted, 389 U.S. 80, 88 S.Ct. 253, 19 L.Ed.2d 255 (1967), a case in which the indictment was based solely on hearsay evidence."

And at page 567:

"It was against this background that the case of United States v. Arcuri, 282 F.Supp. 347 (E.D. N.Y. 1968) was decided in the Eastern District of New York. That case involved an indictment based solely on hearsay, and after reviewing the principles and the cases on this problem, Judge Weinstein made a prospective ruling:

'a timely motion to dismiss an indictment handed down after March 31 of 1968 will be granted without a showing of prejudice to the defendant if it is clear that hearsay alone was deliberately relied upon when better evidence was readily available for presentation to the grand jury.' At 351.

"*Arcuri* was taken up to the circuit court which once more reviewed the cases and then, in dealing with the case at bar, repeated the language of Judge Weinstein just quoted, and added:

'In light of the precedents we find no sufficient basis for disturbing the court's refusal to dismiss this indictment. We repeat, however, the warnings to prosecutors given in *Umans* and *Catino.*' *United States v. Arcuri,* 405 F.2d 691, 694 (2d Cir. 1968).

"I read this to mean that Judge Weinstein's ruling on the point stands undisturbed. Any indictment returned after March 31, 1968 which comes before his court will be dismissed if it fails to meet the standards set forth in his *Arcuri* opinion. It logically follows that from the day the

circuit court allowed that rule to stand in the Eastern District of New York, it must have expected a similar rule to be followed by all the district courts within its jurisdiction. I hold, therefore, that any indictment returned after December 9, 1968, the date of the circuit court's decision in *Arcuri,* in which it is 'clear that hearsay alone was deliberately relied upon when better evidence was readily available for presentation to the grand jury' will be dismissed without a showing of prejudice to the defendant.[3] To do less would create out of the warnings of *Umans* and the cases which have followed it a misleading legal fiction which holds out to a defendant the assurance of a right for the violation of which the court is unwilling to provide a remedy.

"Nonetheless, it must be plainly stated that up until this date the circuit court has refused to quash an indictment grounded totally on hearsay."

Thereafter, it appears that the practice in the second circuit has been to quash indictments grounded totally on hearsay if such indictments issued after 1968, even if "no prejudice [resulted] to the defendant . . . when better evidence was readily available for presentation to the grand jury."[2] No cases to the contrary have been found.

In *Russell v. U.S., supra,* the defendants were charged with the crime of refusing to answer pertinent questions before a Congressional Committee. The defendants were tried in the District of Columbia and that District's Circuit Court affirmed the convictions ren-

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[2]*United States v. Arcuri,* 282 F.Supp. 347 (E.D.N.Y. 1968), 405 F.2d 691, 694 (2d Cir. 1968).

dered in the trial court. On certiorari, the Supreme Court reversed.

In an opinion by Mr. Justice Stewart, speaking for five members of the court, in which Mr. Justice Douglas concurred in a separate opinion, the Supreme Court held that inasmuch as the indictment returned by the grand jury failed to identify the subject under inquiry by the congressional subcommittee, the indictments were defective. Mr. Justice Stewart, reviewing the history of grand jury indictments and the basic protection afforded defendants under the Fifth and Sixth Amendments, stated at page 770:

> "A grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and *perhaps not even presented to*, the grand jury which indicted him. [Citing authority] This underlying principle is reflected by the settled rule in the Federal courts that an indictment may not be amended except by *resubmission to the grand jury*, unless the change is merely a matter of form. [Citing authorities]" (Emphasis added.)

This court has held in *Costello v. U.S.*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), that an indictment obtained on the basis of hearsay evidence alone is not necessarily defective. But this court has

never dealt with the question presented in the instant petition of whether a defective indictment may be amended by a different grand jury on the basis of skeletal hearsay evidence alone.

The instant petition for writ of certiorari is, obviously, from an interlocutory judgment of the Ninth Circuit Court of Appeals. The judgment is final as to the district court in that the district court refused to dismiss the indictment and indicated that it would require petitioners to plead and go to trial. The circuit court indicated that it would review the constitutionality of the indictment only after plea, trial and conviction.

It is this decision below, unsettled by this court, and in conflict with the practices of three other circuits, which constitutes the important question of federal law raised in the instant petition.

2. The Decision of the Ninth Circuit Court Below Conflicts With the Decisions of Courts of Appeal in Three Other Circuits Relating to the Testing of the Validity of Grand Jury Indictments. This Court Has Not Ruled Upon the Question.

Omitting, for the moment, the constitutionality of obtaining an amendment to a defective indictment from a different grand jury, this court is faced with the subsidiary question whether an indictment obtained through improper prosecutorial practices is entitled to a presumption of constitutionality until it is tested on an appeal after conviction.

The Second Circuit now requires that grand juries be presented with non-hearsay evidence, when available, and that grand juries be cautioned prospectively whenever hearsay evidence is presented them. Further, the Second Circuit now dismisses indictments without

a showing of prejudice to defendants if it is clear that hearsay alone was deliberately relied upon when better evidence was readily available. *United States v. Arcuri,* 405 F.2d 691 (2d Cir. 1968). See also, *United States v. Liebowitz,* 420 F.2d 39 (2d Cir. 1969); *United States v. Umans, supra; United States v. Filippatos, supra; United States v. Arcuri,* 282 F.Supp. 347 (E.D.N.Y. 1968).

The Second and Seventh Circuits make transcripts of grand jury testimony of government witnesses available to defendants automatically (unless the government can show an overriding case for secrecy). (*United States v. Amabile, supra; United States v. Youngblood*, 379 F.2d 365 (2d Cir. 1967).)

The Ninth Circuit, on the other hand, has consistently held that indictments based solely on hearsay evidence are not subject to attack (*Jack v. U.S.,* 409 F.2d 522 (9th Cir. 1969)); that there is no requirement that grand jury proceedings be recorded or transcribed (*Loux v. U.S.,* 389 F.2d 911 (9th Cir. 1968)); that the government need not present to the grand jury evidence which tends to undermine the credibility of its witnesses (*Loraine v. U.S.,* 396 F.2d 335 (9th Cir. 1968)).

Costello v. U.S., supra, allowed the government to obtain indictments based on hearsay evidence, where non-hearsay evidence was not readily available to the grand jury and where such evidence was also extremely complex and difficult to present.

Thus, a very real conflict now exists between the applicable rules of the Second, Seventh and District of Columbia Circuits on the one hand, and the Ninth Circuit on the other hand, with respect to the time to

test, and the standards by which to measure, the constitutional sufficiency of an indictment.

As between the Ninth and Second Circuits, the presently applicable standards have resulted in decisions which are so divergent that an indictment based wholly on hearsay evidence when non-hearsay evidence was readily available and easily presentable would be sufficient to sustain a conviction in the Ninth Circuit whereas the identical indictment would be dismissed even before trial without a showing of prejudice in the Second Circuit.

Conclusion.

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX.

Memorandum.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. George C. Parker, Defendant-Appellant. No. 73-1230.

United States of America, Plaintiff-Appellee, vs. James W. Boylan, Defendant-Appellant. No. 73-1231.

[April 10, 1973]

Appeal from the United States District Court for the Eastern District of California

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Before: CHAMBERS and KILKENNY, Circuit Judges, and KING,* District Judge.

PER CURIAM:

We regard the appeal impermissible as one on an interlocutory ruling in a criminal case. Treating the appeal as a petition for an extraordinary writ, we do not regard the case as one where interference at this time would be justified.

Dismissed.

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*The Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1516

GEORGE C. PARKER AND JAMES W. BOYLAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question is whether the court below properly dismissed petitioners' interlocutory appeal, which sought review (before trial) of the district court's denial of a motion to dismiss an indictment.

On June 28, 1972, an indictment was returned in the United States District Court for the Eastern District of California (in Fresno) charging petitioners with one count of conspiracy (18 U.S.C. 371), twelve counts of misapplication by a bank officer (18 U.S.C. 656), seven counts of false entry by bank officers (18 U.S.C. 1005), nineteen counts of aiding and abetting (18 U.S.C. 2), and two counts of illegal receipt of commissions or gifts (18 U.S.C. 215). On October 11, 1972, another indictment was returned by a different grand jury in the Eastern District of California (in Sacramento) which was substantially identical to the earlier indictment except for some changes in the language of

the conspiracy and misapplication counts with respect to criminal intent. On October 30, 1972, the earlier indictment was dismissed on the government's motion.

Thereafter, on December 11, 1972, petitioners filed a motion to dismiss the second indictment, contending that it was improperly based on hearsay. From the denial by the district court of that motion, petitioners attempted to take an appeal to the court of appeals, which, *per curiam,* dismissed the appeal as interlocutory and therefore premature (Pet. App.).

It is uniformly held that an order denying a motion to dismiss an indictment is not a final decision within the meaning of 28 U.S.C. 1291 and is therefore not appealable. See, *e.g., United States* v. *Doucet,* 461 F. 2d 1095 (C.A. 5); *United States ex rel. Rosenberg* v. *United States District Court for the Eastern District of Pennsylvania,* 460 F. 2d 1233 (C.A. 3); *The People of the Territory of Guam* v. *Lefever,* 454 F. 2d 270 (C.A. 9); *United States* v. *Curry,* 442 F. 2d 428 (C.A. 4); *United States* v. *Garber,* 413 F. 2d 284 (C.A. 2); see also *DiBella* v. *United States,* 369 U.S. 121. The court below was therefore correct in dismissing the appeal. The merits of petitioners' claim regarding the propriety of the indictment can be raised upon direct review of any criminal conviction that may result.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

DOJ-1973-07